119-152

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~1002~~ 628

HIRAM M. FRENCH, PLAINTIFF IN ERROR,

vs.

ASSYRIA HALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 2, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 15th day of December, A. D. 1883, came Hiram M. French, by M. B. Carpenter, Esq., his attorney, and filed in said court his complaint, and sued out of said court a writ of summons against Assyria Hall, and the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States within and for the District aforesaid.

HIRAM M. FRENCH, Plaintiff, *vs.* ASSYRIA HALL, Defendant.

The plaintiff complains and alleges—

That at the several times hereinafter mentioned he was and now is a citizen of the State of Massachusetts.

2 That at the several times hereinafter mentioned the defendant was and now is a citizen of the State of Colorado.

For a First Cause of Action.

The defendant is indebted to the plaintiff on an account for the work, labor, and services of the plaintiff as a broker in obtaining for the defendant the sum of twenty-five thousand dollars as a part payment and forfeit upon the sale of certain mining property in which the defendant was interested, known as the Dolly Varden Mining Estate, performed at the request of the defendant between the 1st day of February, 1881, and the 1st day of July, 1881, at Denver, in the county of Arapahoe and State of Colorado, in the sum of five thousand dollars, and interest thereon at the rate of ten per cent. per annum from the 1st day of July, 1881.

That no part thereof has been paid.

For a Second Cause of Action.

The defendant is indebted to the plaintiff on an account for the work, labor, and services of the plaintiff as a broker in obtaining for the defendant the sum of twenty-five thousand dollars as a part payment and forfeit upon the sale of certain mining property in which the defendant was interested, known as the Dolly Varden Mining Estate, performed at the request of the defendant between the 1st day of February, 1881, and the 1st day of July, 1881, at Denver, in the county of Arapahoe and State of Colorado, in the sum of twenty-five hundred dollars, and interest thereon at the rate of ten per cent. per annum from the 1st day of July, 1881.

That no part thereof has been paid.

For a Third Cause of Action.

That on the 1st day of July, 1881, at Alma, in the county
3 of Park and State of Colorado, the defendant received twenty-five hundred dollars from one George W. Brunk to be paid to plaintiff; that the defendant has not paid the same, nor any part thereof, though often requested so to do.

Wherefore plaintiff demands judgment against the defendant for the sum of five thousand dollars and interest thereon at the rate of ten per cent. per annum from the 1st day of July, 1881, and costs of suit.

(S'g'd) M. B. CARPENTER,
Attorney for Plaintiff.

(Endorsed:) 1411. U. S. circuit court, district of Colorado. Hiram M. French *vs.* Assyria Hall. Complaint. Filed Dec. 15, 1883. (S'g'd) Edward P. Bishop, clerk. M. B. Carpenter, att'y for plaintiff.

And the said summons is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

HIRAM M. FRENCH, Plaintiff, *versus* ASSYRIA HALL, Defendant.

Complaint filed in the clerk's office this 15th day of De-
4 cember, A. D. 1883.

The President of the United States of America to Assyria Hall, Greeting:

You are hereby notified that an action has been brought in said court by Hiram M. French, plaintiff, against you as defendant to recover the sum of $5,000.00 due from you, the said defendant, to the said plaintiff for work, labor, and services of plaintiff as a broker at defendant's request, and for failure to pay over to plaintiff certain moneys received by defendant for plaintiff, together with interest on said sum at the rate of 10% per annum from July 1st, 1881, and for the costs of this suit, as more fully set forth and described in the complaint filed herein, and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for said sum of $5,000.00, interest as aforesaid and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit

court, at the city of Denver, in said district, this 15th day of Dec'r, A. D. 1883, and of the Independence of the United States the 108th year.

5 [Seal U. S. Cir. C't, Colorado.]

(S'g'd) EDWARD F. BISHOP, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

I hereby certify that I received the within writ on the 15th day of December, A. D. 1883, and that I have personally served the same upon the said defendant, Assyria Hall, by delivering to him, the said defendant, personally, a true copy of the within writ, at Denver, county of Arapahoe, on the 19th day of December, A. D. 1883.

This writ therefore returned, executed as the law directs, this 19 day of December, A. D. 1883.

(S'g'd) W. A. SMITH, *Marshal.*

(Endorsed:) Gen. No. 1411. Circuit court of the United States for the district of Colorado. Hiram M. French, plaintiff, *versus* Assyria Hall, defendant. Summons. Filed this 19th day of December, A. D. 1883. (S'g'd) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. M. B. Carpenter, of Denver, attorney for plaintiff.

6 And afterwards and on, to wit, the 29th day of December, A. D. 1883, came the said defendant, by Messrs. Montgomery & Waybright, his attorneys, and filed in said court and in said cause his answer to the complaint heretofore filed herein. And the said answer is in words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States for the District aforesaid.

HIRAM M. FRENCH, Plaintiff, *vs.* ASSYRIA HALL, Defendant.

The defendant, answering the complaint of plaintiff, denies—

First. He denies that he is indebted to the plaintiff on an account, or on any account or otherwise, for the work, labor, or services of the plaintiff as a broker, or for any work, labor, or services of the plaintiff in any other manner or capacity in obtaining for the defendant the sum of twenty-five thousand dollars, or any other sum, as a part payment and forfeit in the sale of certain mining property in which this defendant was interested, known as the

7 Dolly Varden Mining Estate, or for any other purpose, or in any other manner, or in any sum whatever; denies that the plaintiff ever performed any services whatsoever for this

defendant as a broker or otherwise; denies that this defendant ever requested the plaintiff to perform any services, as a broker or otherwise, for this defendant, at any time, in the city of Denver or at any other place.

Second. The defendant denies specifically each and every allegation and averment in the pretended second cause of action in the plaintiff's complaint contained.

Third. Defendant denies that on the first day of July, A. D. 1881, at Alma, in the county of Park and State of Colorado, or at any other time or place, the defendant received twenty-five hundred dollars from George W. Brunk, to be paid to plaintiff, or that the defendant received any sum of money whatever from any person or source to be paid to said plaintiff.

Wherefore defendant demands judgment that said action be dismissed and that he have judgment against the plaintiff for the costs and disbursements herein expended.

(S'g'd) MONTGOMERY & WAYBRIGHT,
Attorneys for Defendant.

(Endorsed:) No. 1411. Circuit court of the United States. Hiram M. French *vs.* Assyria Hall. Answer. Filed Dec. 29, 1883.
8 (S'g'd) Edward F. Bishop, clerk. Montgomery & Waybright, att'ys for def't.

And afterwards and on, to wit, the 20th day of May, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Jury Trial, &c.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and the said defendant, by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon comes a jury, to wit:

1, Benair C. Sawyer; 2, David J. Cramer; 3, Isaac Wilcox; 4, W. S. Duncan; 5, John A. Strouse; 6, J. Sickman; 7, John Leahy; 8, J. C. Huober; 9, James A. Hudson; 10, W. T. Lewis; 11, Joseph Sartori; 12, William L. Visscher, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the issues herein joined and a true verdict render according to the evidence; and thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the
9 court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence

heard or any part thereof, nor to listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

And afterwards and on, to wit, the 21st day of May, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Jury Trial. Finding for Plaintiff.

HIRAM FRENCH
vs. } 1411.
ASSYRIA HALL.

Action on an account.

At this day come again the said parties by their attorneys respectively, and the said jurors, being now all here, present, and in the jury box, the hearing of the evidence herein is resumed.

And the said jurors, having heard the evidence produced herein, and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards, on this same day, come again the said
10 jurors, and on their oaths do say they find the issues for the plaintiff and assess his damages at five thousand dollars ($5,000.00).

And afterwards and on, to wit, the 22nd day of May, 1884, came again the said defendant by his attorneys aforesaid, and filed in said court and in said cause his motion for new trial. And the said motion for new trial is in words and figures as follows, to wit:

Motion for New Trial.

In U. S. Circuit Court, District of Colorado.

HIRAM M. FRENCH *vs.* ASSYRIA HALL.

Comes now the defendant, and after verdict, before judgment, respectfully moves the court now here to set aside the verdict herein rendered in favor of the plaintiff and grant a new trial in said cause upon the following grounds, to wit:

First. That said verdict is against and contrary to law.

Second. That said verdict is against and contrary to the instructions of the court submitted to the jury.

Third. That said verdict is against and contrary to the evidence in the cause.

Fourth. That the court erred in permitting the answers to interrogatories 4th, 5th, and 6th in the deposition of E. H. Goff to be read to the jury against the objections of the defendant, to which rulings the defendant at the time excepted.

(S'g'd) MONTGOMERY & WAYBRIGHT,
Atty's for Def't.

(Endorsed): 1411. In U. S. circuit c't, dist. of Colorado. H. M. French *vs.* Assyria Hall. Motion for new trial. Filed May 22, 1884. (S'g'd) Edward F. Bishop, clerk. Montgomery & Waybright, att'ys for def't.

11 And afterwards and on, to wit, the 31st day of May, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. New Trial on Payment of Costs.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and the said defendant, by B. F. Montgomery, Esq, his attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined coming on now to be heard is argued by counsel, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be granted, conditioned, nevertheless, that the said defendant pay into court for the use of the said plaintiff the costs of the said plaintiff to this day, to be taxed.

12 And afterwards and on, to wit, the 7th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884 of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Jury Trial, &c.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and the said defendant, by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon comes a jury, to wit:

1, J. M. S. Eagan; 2, F. A. O'Mara; 3, A. Jacobs; 4, Thomas Woodward; 5, James Bond; 6, John B. Hunter; 7, C. V. Howard; 8, F. C. Avery; 9, John H. Figary; 10, Edward W. Morse; 11, Ira B. Masterson; 12, Henry Neikirk, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and

truly try the issues herein joined and a true verdict render according to the evidence. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard, or
13 any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 8th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order, Trial, &c. Finding for Defendant.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day come again the said parties, by their attorneys, respectively. And it now appearing to the court that F. A O'Mara, a juror duly sworn and impaneled in this said cause, is absent upon being called, thereupon the said plaintiff and the said defendant, here in open court consenting thereto, and upon their motion, it is ordered by the court that the trial of the issues herein joined be resumed and continued with eleven (11) jurors, the verdict of the said eleven (11) jurors to stand with full force and effect as if the said verdict was the verdict of twelve jurors duly impaneled according to law.

And thereupon the hearing of the evidence herein is re-
14 sumed. And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this same day, come again the said jurors, and on their oaths do say they find the issues herein joined for the said defendant.

And afterwards and on, to wit, the 11th day of July, A. D. 1884, came again the said plaintiff, by M. B. Carpenter, Esq., his attorney, and filed in said court and in said cause his motion for new trial. And the said motion for new trial is in words and figures as follows, to wit:

(Endorsed): 1411. In U. S. circuit c't, dist. of Colorado. H. M. French *vs.* Assyria Hall. Motion for new trial. Filed May 22, 1884. (S'g'd) Edward F. Bishop, clerk. Montgomery & Waybright, att'ys for def't.

11 And afterwards and on, to wit, the 31st day of May, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. New Trial on Payment of Costs.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and the said defendant, by B. F. Montgomery, Esq, his attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined coming on now to be heard is argued by counsel, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be granted, conditioned, nevertheless, that the said defendant pay into court for the use of the said plaintiff the costs of the said plaintiff to this day, to be taxed.

12 And afterwards and on, to wit, the 7th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884 of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Jury Trial, &c.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and the said defendant, by B. F. Montgomery, Esq., his attorney, also comes.

And thereupon comes a jury, to wit:

1, J. M. S. Eagan; 2, F. A. O'Mara; 3, A. Jacobs; 4, Thomas Woodward; 5, James Bond; 6, John B. Hunter; 7, C. V. Howard; 8, F. C. Avery; 9, John H. Figary; 10, Edward W. Morse; 11, Ira B. Masterson; 12, Henry Neikirk, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and

truly try the issues herein joined and a true verdict render according to the evidence. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard, or
13 any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 8th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order, Trial, &c. Finding for Defendant.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day come again the said parties, by their attorneys, respectively. And it now appearing to the court that F. A O'Mara, a juror duly sworn and impaneled in this said cause, is absent upon being called, thereupon the said plaintiff and the said defendant, here in open court consenting thereto, and upon their motion, it is ordered by the court that the trial of the issues herein joined be resumed and continued with eleven (11) jurors, the verdict of the said eleven (11) jurors to stand with full force and effect as if the said verdict was the verdict of twelve jurors duly impaneled according to law.

And thereupon the hearing of the evidence herein is re-
14 sumed. And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this same day, come again the said jurors, and on their oaths do say they find the issues herein joined for the said defendant.

And afterwards and on, to wit, the 11th day of July, A. D. 1884, came again the said plaintiff, by M. B. Carpenter, Esq., his attorney, and filed in said court and in said cause his motion for new trial. And the said motion for new trial is in words and figures as follows, to wit:

Motion for New Trial.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court, &c.

HIRAM M. FRENCH, Plaintiff,
vs.
ASSYRIA HALL, Defendant.

Now comes plaintiff and moves the court to set aside the verdict and for a new trial, for the following reasons, viz:

1st. The verdict is contrary to law.

2nd. The verdict is contrary to the evidence.

3rd. The court erred in refusing to allow Mason B. Carpenter, a witness produced by plaintiff, to be sworn and examined on behalf of plaintiff.

4th. Because of the charge to the jury being unfavorable to plaintiff.

15 5th. For other good and sufficient reasons.

(Signed) M. B. CARPENTER,
Attorney for Plaintiff.

(Endorsed:) 1411. U. S. circuit court, district of Colorado. Hiram M. French *vs.* Assyria Hall. Motion for new trial. Filed Jul. 11, 1884. (S'g'd) Edward F. Bishop, clerk. M. B. Carpenter, att'y for plaintiff.

And afterwards and, to wit, the 28th day of July, A. D. 1884, the same being one of the regular juridical days of the May term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Continued and Motion for New Trial Reserved.

HARAM M. FRENCH }
vs. } 1411.
ASSYRIA HALL. }

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and thereupon it is ordered by the court that this cause stand continued, and that decision by the court upon the said plaintiff's motion for a new trial of the issues herein joined be reserved until the next regular term of the court.

16 And afterwards and on, to wit, the 13th day of October, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Hon-

orable David J. Brewer, circuit judge, and the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. New Trial Denied and Judgment for Defendant on Verdict.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said defendant, by B. F. Montgomery, Esquire, his attorney, and the motion of the said plaintiff for a new trial of the issues herein journed having heretofore come on to be heard, and having been asgued by counsel and having been taken under advisement by the court, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Thereupon, on motion of the said defendant, it is ordered by the court that judgment be entered upon the verdict of the jury herein.

Wherefore it is considered by the court that the said defendant go hence hereof without day, and have and recover of and
17 from the said plaintiff his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 27th day of October, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the honorable Moses Hallet, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order. Thirty Days to File Bill of Exceptions.

HIRAM M. FRENCH
vs.
ASSYRIA HALL. } 1411.

Action on an account.

At this day comes the said plaintiff, by M. B. Carpenter, Esq., his attorney, and thereupon, on his motion, it is ordered by the court that he have thirty (30) days from this day within which time to file his bill of exceptions reserved by him on the trial of this cause.

And afterwards and on, to wit, the 25th day of November, A. D. 1884, came again the said plaintiff, by his attorney aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein. And the said bill
18 of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the United States within and for said District.

HIRAM M. FRENCH, Plaintiff, *vs.* ASSYRIA HALL, Defendant.

Plaintiffs bill of exceptions.

Be it remembered that on the second trial of the issue joined, before Moses Hallet, district judge of said district, in said court presiding, and a jury, the plaintiff, to maintain the issue on his part, gave evidence tending to prove that the defendant Hall promised to pay him five thousand dollars ($5,000) for his services in assisting the defendant to make sale of certain mining property in which he was interested. The defendant, to maintain the issue on his part, gave evidence tending to prove that he never promised to pay plaintiff any sum whatever. And the defendant, while on the stand as a witness, on cross-examination, testified that he never told any one that he promised to pay plaintiff the sum of five thousand
19 dollars ($5,000), and further testified that he never told the attorney of plaintiff, Mason B. Carpenter, that he promised to pay plaintiff the sum of five thousand dollars ($5,000).

The plaintiff, in rebuttal, offered as a witness the said attorney, Mason B. Carpenter, who was the sole attorney of plaintiff in conducting the trial of said cause, and who offered to testify that the defendant, Hall, had told him, the said Carpenter, that at a certain time and place he, the defendant, promised to pay the plaintiff, French, the sum of five thousand dollars ($5,000).

But the court refused to allow the said Carpenter to be sworn as a witness for plaintiff, because he was acting as an attorney for plaintiff in conducting the trial of said cause.

And the counsel for plaintiff then and there excepted to such ruling of the court.

Afterwards, and upon motion for new trial, the court said that the said Carpenter was in fact competent to testify as a witness for plaintiff, but that his testimony was not offered at the proper time; that the testimony of the witness Carpenter was receivable only in chief and upon the plaintiff's opening, and not in rebuttal. This being the second trial of the cause, plaintiff was not surprised by the testimony of defendant Hall, and it was his duty to give in chief and in his opening all evidence as to admissions by defendant, as well as other matters. For this reason the motion for a new trial was denied, to which ruling plaintiff also then and there excepted.

And because these several matters do not appear by the record herein, the plaintiff brings this his bill of exceptions, and
20 prays his honor, the district judge of said district, who presided at the trial, to sign and seal the same and make it part of the record herein, which is accordingly done.

(S'g'd) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) 1411. Hiram M. French *vs.* Assyria Hall. Bill of exceptions. Filed Nov. 25, 1884. (S'g'd) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 7th day of September, A. D. 1885, came again the said plaintiff, by Messrs. Amos Steck and M. B. Carpenter, his attorneys, and filed in said court and in said cause his bond, and sued out of said court a writ of error and citation to the Supreme Court of the United States. And the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents that Hiram M. French, as principal, and James M. Strickler and Mason B. Carpenter, as sureties, are held and firmly bound unto Assyria Hall in the full and just sum of two hundred dollars, to be paid to the said Assyria Hall, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 4th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

21 Whereas lately at the October term, A. D. 1884, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between Hiram M. French, plaintiff, and Assyria Hall, defendant, judgment was rendered against the said Hiram M. French, and he having obtained a writ of error to reverse the judgment of the said court on a citation directed to the said Assyria Hall, citing and admonishing him to be and appear at a term of — Supreme Court of the United States, to be held at Washington, D. C., on the second Monday of October next:

Now the condition of the above obligation is such that if the said Hiram M. French shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(S'g'd) HIRAM M. FRENCH. [SEAL.]
JAMES M. STRICKLER. [SEAL.]
MASON B. CARPENTER. [SEAL.]

Approved.
MOSES HALLETT, *Judge.*

STATE OF COLORADO, *County of Arapahoe,* } *ss:*

Jas. M. Strickler and Mason B. Carpenter, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth, in real estate & personal property, the sum below set opposite his name—that is to say, over one thousand dollars each, over

22 and above all his just debts and liabilities, and in property subject to levy and sale upon execution.

(S'g'd) JAMES M. STRICKLER.
MASON B. CARPENTER.

Subscribed and sworn to before me at Denver, this 4th day of September, A. D. 1885.

[SEAL.] (S'g'd) W. N. McBIRD,
Notary Public.

(Endorsed:) Gen. No. 1411. Circuit court of the United States, district of Colorado. Hiram M. French *vs.* Assyria Hall. Bond, $200. Filed this 7 day of Sept., A. D. 1885. (S'g'd) Edward F. Bishop, clerk.

23 *Writ of Error to Circuit Court U. S. District of Colorado.*

UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

The President of the United States to the judge of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, between Hiram M. French and Assyria Hall, a manifest error hath happened, to the great damage of the said Hiram M. French, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 5th day of September, in the year of our Lord one thousand eight hundred and eighty-five and of the Independence of the United States the 110th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT, *Judge.*

24 *Return.*

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 18th day of September, A. D. 1885.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

[Endorsed:] Gen. No. 1411. Circuit court of the United States. Hiram M. French, plaintiff in error, *vs.* Assyria Hall. Writ of error to circuit court U. S. district of Colorado. Filed in circuit court of the U. S. this 7th day of Sept., A. D. 1885. Edward F. Bishop, clerk, by ——, deputy clerk. Amos Steck & M. B. Carpenter, attorney- for plaintiff in error.

25 & 26 *Citation.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

U. S. Circuit Court.

The United States of America to Assyria Hall or B. F. Montgomery, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within & for the district of Colorado, wherein Hiram M. French is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 5th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

MOSES HALLETT, *Judge*.

27 *Proof of Service.*

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

On this 7th day of September, A. D. 1885, personally appeared Mason B. Carpenter before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to B. F. Montgomery, attorney of record for the within-named defendant in error, Assyria Hall, on said 7th day of September, 1885, at Denver, in the county of Arapahoe and district of Colorado aforesaid.

MASON B. CARPENTER.

Sworn to and subscribed before me this 7th day of September, A. D. 1885.

[Seal United States District Court, District of Colorado.]

EDWARD F. BISHOP,
Clerk District Court U. S.,
By F. W. TUPPER,
Deputy Clerk.

[Endorsed:] Gen. No. 1411. Circuit court of the United States, district of Colorado. Hiram M. French, plaintiff in error, *vs.* Assyria Hall, defendant in error. Citation. Filed in circuit court of the U. S. this 7th day of Sept., A. D. 1885. Edward F. Bishop, clerk, by ——, deputy clerk. Amos Steck & M. B. Carpenter, attorneys for plaintiff in error.

28 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein Hiram M. French was plaintiff, and Assyria Hall was defendant, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 18th day of September, A. D. 1885.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Transcript 5.75.

Endorsed on cover: Colorado C. C. U. S. No. 1002. Hiram M. French *vs.* Assyria Hall, plaintiff in error. Filed October 2, 1885.

119-152

Office Supreme Court U. S.
FILED.
JAN 14 1886
JAMES H. McKENNEY.
CLERK.

119-152

Assignment of Error, Brief and Argument of Plaintiff in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

No. 1002.

HIRAM M. FRENCH, PLAINTIFF IN ERROR,

VS.

ASSYRIA HALL, DEFT. IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

No. 1002.

HIRAM M. FRENCH, PLAINTIFF IN ERROR,

VS.

ASSYRIA HALL, DEFT. IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

ASSIGNMENT OF ERRORS.

Now comes the said Hiram M. French, plaintiff in error, and says that in the record and proceedings aforesaid there is manifest error, in this, to-wit:

1. The court erred in refusing to allow the attorney, a

witness produced by plaintiff, to be sworn and examined on behalf of plaintiff.

2. The court erred in overruling the plaintiff's motion for new trial, by reason whereof the said French prays that the said judgment may be reversed.

AMOS STECK,
M. B. CARPENTER,
Attorneys for French.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

In this case the error assigned relates to the refusal to allow an attorney to be sworn as a witness. The refusal was based upon the sole ground that the witness offered was the attorney. No objection was made by the counsel for defendant. The court made no objection on trial that the evidence was not rebuttal, but refused to allow attorney to be a witness as a matter of law.

The authorities in the United States do not sustain the position, but are to the effect that a witness cannot be excluded merely because his testimony is to be given in behalf of his client.

Potter vs. Inhabitants of Ware, 1Cush. 519.
Chaffee vs. Thomas, 7 Cow. 358.
Newman vs. Bradley, 1 Dall. 240.
Miles vs. O'Hara, 1 S. and R. 32.
Geisse vs. Dobson, 3 Whart. 34.
Slocum vs. Newby, 1 Murph. 423.
Reid vs. Colcock, 1 Nott and McC. 592.
Chadwick vs. Upton, 3 Pick. 442.
Jones vs. Savage, 6 Wend. 658.
Com'nw'lth vs. Moore, 5 J. J. Marsh. 655.
Bandigree vs. Hale, 13 Johns. 125.
Robinson vs. Dauchy, 3 Barb. 20.
Little vs. McKeon, 1 Sandf. 607.

This was the second trial. A verdict for plaintiff had been set aside on the mere whim of the judge.

It became the duty of the attorney to introduce his testimony in behalf of his client because of the action of the judge. The plaintiff and defendant gave the evidence touching the issue and they only testified concerning the promise.

Record folio 18.

The testimony of the attorney became material to contradict the defendant. On cross examination the foundation for rebutting defendant's evidence was made by plaintiff. Defendant was asked whether he ever told any one that he promised to pay plaintiff five thousand dollars. The attorney was offered as a witness to contradict defendant. The evidence was offered to impeach defendant. He could not be impeached until he had testified. The plaintiff could not tell beforehand that Hall would deny having told the attorney. The testimony was proper in rebuttal. It was not cumulative to the testimony of the plaintiff.

Fain vs. Cornett, 25 Ga. 184.
Seaton vs. Chapman, 65 Me. 126.

The question as to whether the evidence offered was or was not rebuttal testimony was not raissd by court or counsel upon trial. The judge presiding at the trial found as a matter of law, when the motion for new trial was argued, that he was wrong in his law, and put into the bill of exceptions the excuse given when deciding the motion for a new trial. We submit that it has no place in the bill of exceptions and only shows to what straights the court was driven to defeat the plaintiff, who once recovered judgment for the amount of his claim.

AMOS STECK,
M. B. CARPENTER,
Attorneys for Plaintiff in Error.

119-152

Office Supreme Court U. S.
FILED.
JAN 14 1886
JAMES H. McKENNEY.
CLERK.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

HIRAM M. FRENCH,
Plaintiff in Error,
vs.
ASSYRIA HALL,
Defendant in Error.

No. 1002.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

EDWARD O. WOLCOTT,
Attorney and of Counsel for Defendant in Error.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

HIRAM M. FRENCH,
Plaintiff in Error,
vs.
ASSYRIA HALL,
Defendant in Error.

No. 1002.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought to recover the sum of five thousand dollars ($5,000) upon an alleged promise of the defendant in error to pay that sum to plaintiff in error for

his services in assisting to make a sale of certain mining property, in which defendant in error was interested.

Upon the trial in the court below evidence was given in behalf of the plaintiff which tended to show that the defendant had made such promise. The promise, if any was made, was oral, and not in writing. It was the second trial of the case. At the close of the plaintiff's evidence the defendant was called as a witness in his own behalf, and upon his direct examination gave evidence which tended to prove that he had never made the promise alleged by the plaintiff, nor any promise in the premises. Upon his cross-examination he testified not only that he never promised to pay this sum, or any sum, to the plaintiff, but he also testified that he had never told anyone that he had promised to pay the plaintiff the sum of five thousand dollars ($5,000.) Plaintiff's counsel, in the course of the cross-examination, asked the defendant whether he had not told him that he promised to pay the plaintiff the sum of five thousand dollars ($5,000) for such services. To this interrogatory the defendant responded that he had not.

At the close of the defendant's evidence plaintiff's counsel asked to be sworn as a witness, and offered to testify that defendant had told him that he had promised to pay the plaintiff the sum mentioned. The Circuit Judge refused to permit plaintiff's counsel to be sworn as a witness, because he was acting as an attorney for plaintiff in conducting the trial of the case. This was assigned for error, upon which was based a motion for a new trial. Upon the decision of that motion the court below said in effect that plaintiff's counsel was in fact competent to testify as a witness, had his testimony been offered at the proper time, but that the testimony was receivable only in chief and upon the plaintiff's opening, and not in rebuttal. This being the second trial of the cause, plaintiff was not surprised by the testimony of the defendant, and it was his

duty to give in chief and in his opening all evidence as to admissions by defendant, as well as other matters. For this reason the motion for a new trial was denied. This statement of the Circuit Judge is embodied in and constitutes a part of the bill of exceptions in this case.

POINTS.

I.

That an attorney is a competent witness in behalf of his client, although he may be engaged in the condnct of a trial, is, probably, now well settled, nevertheless the inconsistency of the relation of witness and counsel is such that all courts have discouraged the practice of permitting counsel to testify upon the trial of causes which they have in charge. It has been the practice of the Circuit Judge before whom this cause was tried, to uniformly refuse to permit counsel to be sworn as witnesses when engaged in the trial of a cause, except to prevent injustice. This course has been long continued in the District of Colorado, and has undoubtedly done much to prevent conduct on the part of counsel in this particular which may be characterized as at least unbecoming an attorney, if not improper and indecent. There is no prescribed rule in this district in this respect, but the practice has been uniform and long continued. Of this plaintiff's counsel must have been well advised. In view of this fact it was imperatively necessary that the statement or admission of defendant, which he offered himself as a witness to prove, should have not only been admissible, but should have been given at the proper time.

The sentiment of the courts and the profession upon the subject under discussion, is well expressed in "Weeks on Attorneys at Law," section 124. "It has been doubted," says Wharton, in his recent admirable work on law of evidence in civil issues, "whether a lawyer, who in any capac-

ity has addressed a jury in a cause, will be permitted to testify in the same cause as a witness; though, as this might, in extraordinary cases, work injustice, the exclusion should be confined to those instances in which the attempt is recklessly and unnecessarily to unite the functions of counsel and witness. The mere fact that the case has been opened by an attorney who has previously cross-examined witnesses on the other side, does not make him incompetent as a witness for his client. Where, however, counsel thus become witnesses, it may be a proper exercise of the discretion of the court to prohibit them from subsequently addressing the jury on the case thus made up; and the testifying of the counsel should be confined to extreme cases, as to which there is no other proof." See

Cobbett vs. Hudson, 1 Ellis and Blackburn Rep., 11.
Ross vs. De Moss, 45 Ill., 447.
Follansbee vs. Walker, 72 Penn. State 230.

II.

That the Circuit Judge was right in his position that proof of the admission claimed to have been made by defendant should have been offered by plaintiff as a part of his evidence in chief, is manifest. It was in no case properly admissible in the rebuttal of anything to which defendant had testified. It is true that the admission of the testimony at the time it was offered was discretionary with the court, but the exercise of that discretion in the exclusion of the testimony at the time it was offered will not be reviewed by this court. The reason for the refusal to listen to the testimony of the counsel as witness is not material. The plaintiff was not entitled to introduce this evidence at that stage of the trial. It was a part of his evidence in chief. This is apparent from the nature of the issue tried. The action was based upon a parol promise to pay. Evi-

dence of the admission of the defendant that he had made such promises was as much a part of plaintiff's affirmative case as any other evidence which might properly be given upon that subject. The court so held in deciding the motion for a new trial. The question is fairly presented, whether the discretion which is vested in the trial court, as to the order of proof and the conduct of the trial may be reviewed by this court, in the absence of any fact or circumstance tending to show either that this discretion was abused or its exercise refused.

In the case of the Philadelphia and Trenton Railroad Co. vs. Stimson, 14 Peters, 448, it is held that "the order of introducing evidence and the times when it may be introduced, are matters of practice within the discretion of the Circuit Court, and upon a writ of error this court will not revise its decision." In the course of his opinion, Story, J., says: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters relating to the practice of the Circuit Courts, with which this court ought not to interfere, unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of Congress. Probably the practice in no two States of the Union is exactly the same; and, therefore, in each State the Circuit Courts must necessarily be vested with a large discretion, in the regulation of their practice. If every party had a right to introduce evidence at any time, at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the court would often be greatly embarrassed, the purposes of justice obstructed, and the parties themselves surprised by evidence destructive of their rights, which they could not have foreseen, or in any manner have guarded against. It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administra-

tion of justice to suitors; and we think that the Circuit Court possesses this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion; and, indeed, if we were called upon to say upon the present record, whether this discretion was, in fact, misapplied or not, we should be compelled to say that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. It is sufficient for us, however, that it was a matter of discretion and practice, in respect to which we possess no authority to revise the decision of the Circuit Court."

In Johnstone vs. Jones et al., 1 Black, 210, it is held that, "this court will not interfere with the discretion of the court in refusing evidence offered in rebuttal, which should have been introduced at first as evidence in chief."

No error is disclosed by the record. The judgment should be affirmed.

EDWARD O. WOLCOTT,

Attorney and of Counsel for Defendant in Error.